

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE,
LODGE #5 (“Union”),**

-and-

CITY OF PHILADELPHIA (“City” or “Employer”)

Grievant: P/O Ernest Lawyer ().

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OPINION and AWARD

AAA Case No. 01-16-0005-2237

BEFORE: Robert A. Grey, Esq., Arbitrator

HEARING DATE: September 17, 2018, at American Arbitration Association, 230
South Broad Street, Philadelphia, PA 19102

APPEARANCES:

FOR THE UNION:

Willig, Williams & Davidson
By: Richard G. Poulson, Esq., Partner

FOR THE EMPLOYER:

City of Philadelphia Law Department
By: Nicole S. Morris, Esq., Chief Deputy City Solicitor

INTRODUCTION

The Philadelphia Police Department (“PPD”) dismissed Grievant for Conduct Unbecoming on the basis of an off-duty incident which occurred on July 19, 2015. The Union seeks that the charges be rescinded and expunged, and Grievant be made whole in all respects. The City seeks denial of the grievance in all respects.

STIPULATED ISSUES

The parties submitted the following stipulated issues:

Was the City's dismissal of Grievant, Ernest Lawyer, for just cause?

If not, what shall be the remedy?

BACKGROUND

Pursuant to the parties' Collective Bargaining Agreement ("CBA"), the hearing of this grievance was held on September 17, 2018. Both parties appeared by counsel and were afforded full, fair and ample opportunity to present and challenge evidence, examine and cross-examine witnesses, and argue their positions. The proceedings were not transcribed by a court reporter and no official transcript was produced. Neither party questioned the arbitrability or fairness of the proceedings. The record was closed upon conclusion of the parties' respective presentations on the hearing day.

This Opinion and Award is based upon detailed and thorough review and analysis of the entire record. All party positions have been considered in rendering this Opinion and Award, whether or not specifically addressed herein.

RELEVANT FACTS

The following salient facts are not materially in dispute, unless noted otherwise. They are presented in chronological order where practicable.

Grievant was appointed to the Department as a Police Officer on or about January 22, 1996. On July 19, 2015, Grievant was involved in an off-duty incident for which the Department charged him with Conduct Unbecoming (1-§026-10), eventually leading to this arbitration. PPD Internal Affairs ("IA") responded to the incident, commencing an investigation carried under IA #15-1100.

On May 31, 2016 the District Attorney's Office ("DA") requested that IA

prepare an arrest warrant for Grievant on charges of assault for his actions on July 19, 2015. On July 21, 2016 the DA approved an Affidavit of Probable Cause Arrest Warrant for Grievant, with charges of Aggravated Assault (F-1), Simple Assault (M-2), REAP (F-2), Criminal Trespass (F-2), and Possession of an Instrument of Crime (M-1). On August 8, 2016, IA filed a Criminal Complaint containing the above charges, and a Warrant of Arrest for Grievant was executed by a Magistrate.

On August 12, 2016, while at IA with Union representation, Grievant was informed of his rights, given his Criminal Gniotek Warnings and an opportunity to respond. On advice of counsel, Grievant did not provide a statement. Pursuant to Police Commissioner's Direct Action, Grievant was notified that he was suspended for thirty (30) days with Intent to Dismiss. Pursuant to the above Warrant of Arrest, Grievant was thereupon arrested. Effective September 8, 2016, Grievant was dismissed from his position of employment with the City based upon the above disciplinary charge of Conduct Unbecoming. On June 5, 2018 Grievant was acquitted of all criminal charges upon trial by jury in the Court of Common Pleas of Philadelphia County.

The Notice of Dismissal, effective September 8, 2016, states, *verbatim*:

You are hereby notified that effective 9/8/16 you are dismissed from your position with the City of Philadelphia as referred to above for the following reasons:

CONDUCT UNBECOMING, SECTION 1-§026-10 (Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and Related Offenses). Also includes any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction nor the pendency of criminal charges is

necessary for disciplinary action in such matters.)

On Sunday, 7/19/15, approximately 7:37 PM, 25th District officers responded to a radio call for a person with a weapon at [REDACTED]. The responding officers were met by R [REDACTED] T [REDACTED], [REDACTED], who stated that police officers were at [REDACTED] and [REDACTED] twice that afternoon because the residents of those addresses were involved in a dispute concerning the pool party in the rear of [REDACTED]. Between 6:30 PM and 7:00 PM, Mr. T [REDACTED] heard yelling outside and looked out his window and observed V [REDACTED] L [REDACTED], [REDACTED], swinging both her arms over the railing between [REDACTED] and [REDACTED] at P [REDACTED] B [REDACTED], A [REDACTED] B [REDACTED] and S [REDACTED] B [REDACTED]. A male, later identified as J [REDACTED] B [REDACTED]s, V [REDACTED] L [REDACTED] brother, took a swing (punch) at P [REDACTED] B [REDACTED] and A [REDACTED] B [REDACTED] over the railing between the two properties. P [REDACTED] B [REDACTED] boyfriend, D [REDACTED] S [REDACTED], came out of [REDACTED] and punched J [REDACTED] Y [REDACTED], who had climbed over the railing as S [REDACTED] was pulling Y [REDACTED] over the railing, and S [REDACTED] fell backward into the front entry of [REDACTED] with Y [REDACTED] falling on top of him. While S [REDACTED] and Y [REDACTED] were fighting in the doorway, you (from [REDACTED]) went inside of [REDACTED] (B [REDACTED] residence) empty handed and came outside with a shovel (wood handle with metal base). You then swung the shovel at the three B [REDACTED] women while on the sidewalk. You missed and hit the side of a car belonging to the B [REDACTED]. The three B [REDACTED] women were holding V [REDACTED] L [REDACTED] and you demanded that they release her. You, using both your hands, swung the shovel at the three B [REDACTED] women twice. R [REDACTED] T [REDACTED] told you that he would jump in the fight if you hit a woman again, and he punched you twice in the head with his right hand in order to get you to stop swinging the shovel. While you were disoriented, the B [REDACTED] women came over and tried to take the shovel from you. You started chasing R [REDACTED] T [REDACTED] but could not catch him. The B [REDACTED] women then went inside [REDACTED]. V [REDACTED] L [REDACTED] took the shovel and started hitting the front door of [REDACTED] 3 or 4 times with it. The police then arrived on location. A [REDACTED] B [REDACTED] stated that she saw you remove the shovel from the hallway of their residence, hit D [REDACTED] S [REDACTED] with the same shovel and punch D [REDACTED] S [REDACTED] more than 5 times. The shovel, inside [REDACTED], was recovered by police.

On 8/12/16 in the presence of Captain Carol Scott-Abrams #54, Internal Affairs Division, Captain Debra Francis #17, 17th District, Lt. John Evans #328, Internal Affairs Division, Lt. John Barker #390, Internal Affairs Division, Timothy Strange, Attorney, Fraternal Order of Police and John McGrody, Vice-President, Fraternal Order of Police, you were given your Criminal Gniotek Warnings and an opportunity to respond to the above allegations. You chose not to respond. You were placed on an immediate

30-day suspension, with the intent to dismiss.

Joint Exhibit 3.

POSITIONS OF THE PARTIES

The positions of the parties can be summarized as follows, in *italics* to denote they are the words of the parties, not the Arbitrator.

City Position

Grievant was terminated by Police Commissioner's Direct Action in August 2016 for his conduct during an off duty incident that occurred on July 19, 2015.

At the time, Grievant lived at [REDACTED], in Philadelphia, a row house connected to [REDACTED]. The [REDACTED] neighbors were having a pool party. Grievant's wife, V [REDACTED] L [REDACTED] ("Ms. L [REDACTED]"), initiated an argument with the [REDACTED] neighbors. This resulted in the police being called to both properties three (3) times on July 19. No arrests were made the first two times. But on the third occasion, D [REDACTED] S [REDACTED], a male occupant of [REDACTED] was severely injured and had to be transported by police to the hospital. The occupant's injuries were caused by J [REDACTED] Y [REDACTED] (Grievant's wife's brother) and Grievant. Y [REDACTED] was arrested at the scene and criminally charged, with the charges ultimately withdrawn. Grievant was subsequently criminally charged, prosecuted and acquitted.

The City's exhibits include the court testimony of two (2) eyewitnesses: a [REDACTED] neighbor, and a neighbor from [REDACTED], across the street. Both of these witnesses testified in court subject to cross examination.

To be fair, Grievant was not home during the first police visit, but was present for the second and third police visits. The incident began as a verbal altercation, which then became

physical, between Ms. L [REDACTED] and the [REDACTED] female neighbors. Then, Grievant and Y [REDACTED] “took up” with the sole [REDACTED] male occupant. It is not clear what started the argument, but it escalated and became physical, with Grievant picking up a shovel. Grievant wielded the shovel, attempting to strike one of the [REDACTED] neighbors, but he missed, instead striking a car parked at [REDACTED]. The record contains a property receipt for the shovel, which was found in two (2) pieces, one (1) of which was found inside Grievant’s [REDACTED] home. There are 75-48s detailing damage to the car from Grievant wielding the shovel.

It is very clear that Grievant became embroiled in the incident instead of de-escalating or removing himself from it. The situation ended-up with the male [REDACTED] neighbor being transported to a hospital, a broken shovel, damage to a [REDACTED] vehicle, and Grievant being charged criminally.

IA began investigating immediately, at the scene. East Detective Division was also on scene. Neighbors were interviewed by IA at the scene and at IA headquarters. 25th District officers responded to scene, including Police Officers Rycek, Keen and Soto. Their IA statements, property receipts and hospital 48s are in the record.

At the close of the IA investigation in August 2016, the Police Commissioner made the determination that Grievant should be dismissed. The Commissioner reviewed the IA investigation, and the fact Grievant had just been reinstated to work, not three (3) months before the July 19, 2015 incident, for very similar conduct. Significantly, the reinstatement resulted from an arbitration award issued April 23, 2015, stemming from another off duty incident Grievant was involved in that took place in 2013. In the 2013 incident Grievant inserted himself while off duty, having an altercation with on duty police. Grievant was

dismissed from PPD, but ultimately reinstated by the 2015 arbitration award, with a thirty (30) day suspension and no back pay.

As a result of the 2013 off duty incident Grievant was out of work for almost two (2) years. He had time to think about his actions. Yet, not three (3) months later, he embroils himself in another off duty incident, ending with his brother-in-law arrested, and a neighbor injured and taken to hospital.

The Police Commissioner took Direct Action to dismiss Grievant before his criminal trial, which began in June, 2018. Grievant was acquitted in court, but his Department charge is Conduct Unbecoming, which does not require conviction on criminal charges.

The Police Commissioner looked at Grievant's behavior on July 19, 2015, including the fact that Grievant could have removed himself from the situation -- over which Grievant arguably had some control --, by going into and staying in his house. But instead, Grievant came out of his house and joined his wife and her brother, with Grievant wielding a shovel, swinging it at his neighbors, and ultimately a neighbor being taken to hospital.

It is not clear whether the injuries to the [REDACTED] neighbor who went to the hospital were caused by Grievant, or by his brother-in-law, but it does not matter because the point is that this level of conduct is unacceptable for a Police Officer, especially a Police Officer who by grace of an Arbitrator got his job back after two (2) years off the job for a prior off duty incident.

The penalty range on its own for this disciplinary charge, not considering prior disciplinary history, is a thirty (30) day suspension to dismissal. The Police Commissioner felt dismissal was warranted in this situation. The Arbitrator should find that, too.

IA Lt. Barker compiled a thorough investigation, which is in the record. It includes interviews of five (5) neighbors, all the responding officers' observations, photographs of injuries and damage to the [REDACTED] car, and Grievant's disciplinary history. The record shows Grievant's inability to conduct himself not only in a manner appropriate for a civilian, but for an officer who is off duty. This is what led to the Police Commissioner's decision to dismiss Grievant.

The Police Commissioner made his decision based on these reasons, and made it clear to this tribunal that based on the same reasons, this tribunal should find just cause for dismissal. Police Commissioner Ross made it clear that he personally, and as Police Commissioner, and the PPD as a whole, take this charge very seriously, and stand 100% behind the decision to dismiss Grievant.

The City maintains that the only appropriate decision is to uphold the dismissal. In the event just cause for dismissal is not found, but just cause for discipline is, the City asks for a thirty (30) day suspension and no back pay. If Grievant is reinstated, he must comply with all pre-hiring requirements, and the Arbitrator is requested to retain jurisdiction. The City requests that the grievance be denied.

Union Position

The City has not established just cause for termination.

Grievant was a 22 year City employee, hired in 1996. On July 19, 2015 he was involved in a melee at his house that he did not start and did not want. But, he had to act, in order to defend his wife and his brother-in-law.

In the summer of 2015 Grievant was in a terrible living situation, on a block of row

homes in the city of Philadelphia. His family shared a wall with rotten neighbors next door. Grievant's wife, V [REDACTED] L [REDACTED], from time to time had arguments and confrontations with these rotten neighbors over a series of months. Earlier in 2015 Grievant had a confrontation with one of these neighbors (a male) over a parking space. Grievant and his family were stuck living next to the "neighbors from hell".

Around this time Grievant was reinstated to work subsequent to the grievance and arbitration process, which determined that Grievant's 2013 discipline was unjust.

The two properties shared a common porch, with just a small railing between them. There was a coveted side yard where another row house used to stand. On July 19 the neighbors were having a pool party in the side yard, with lots of drinking, smoking and rowdiness. Grievant's wife called Grievant several times while he was at work to complain. Grievant told his wife to call the police. Prior to speaking with the neighbors, Grievant's wife called the police.

Grievant did not get involved, and did not instigate any physical conduct. Grievant knows the standards that apply to his conduct as a police officer, on duty and off duty. He has been through the discipline process, so he was extra careful not to engage with the neighbors, despite their continuing harassing and inappropriate conduct toward his family.

When Grievant arrived home on July 19 after working the day shift, he learned there was still trouble between his wife and the neighbors, particularly with the neighbors' daughter. Grievant called the police because an altercation started in the front. Things calmed down for a while, but Grievant noticed another altercation start on the front porch as Grievant's brother-in-law arrived. Grievant stayed inside his house to stay out of the

situation, but his wife and brother-in-law became involved in a physical altercation with several neighbors in the common porch area. Grievant then acted to defend his wife and brother-in-law, trying to break up this fight of several men and women, against just two: Grievant's wife and Grievant's brother-in-law. Grievant tried to separate the people involved in this melee.

In the midst of all this, somebody came out of from the neighbors' house and tried to hit Grievant with a shovel. No idea where shovel came from – it was not Grievant's shovel. Grievant fortunately was able to grab the shovel without getting hit by it. Grievant noticed his wife on the ground, getting beaten up by more than one person. He ran to help his wife, the shovel still in his hand. Grievant certainly did not intend to swing the shovel and hit anyone or anything with it, but did still have the shovel in his hand as he was trying to protect his wife and break up the attack on her. It was all happening very fast.

The police arrived – because Grievant called the police before he exited his house. Everyone scattered, and the incident basically ended. The shovel was in Grievant's house. He did not hide or lie about the shovel. Ultimately, Grievant was arrested.

While the charges were pending Grievant continued to work without incident, assigned to desk duty for about a year. The IA investigation concluded that Grievant engaged in inappropriate off duty misconduct, and in criminal conduct. After Grievant's termination, he was acquitted in a trial by jury earlier this year. The Union asks that Grievant be returned to work and have his career restored.

The question for the Arbitrator is: what was Grievant to do in that situation on July 19, 2015?

The City would have Grievant call the police, and then stay inside his house with blinders on, hoping for the best until the police arrived. Grievant did not do that. Grievant took steps he felt necessary to protect his family and himself. Grievant does not deny getting physical, and does not deny having the shovel.

Grievant did nothing warranting discipline in this incident. He engaged in no misconduct warranting discipline. Therefore, the grievance should be sustained in full, and Grievant should be reinstated with full back pay and benefits, starting from the date of his discipline.

Alternatively, if there is established some conduct warranting discipline, the penalty of termination far exceeds the gravity of the events, and Grievant's actions and judgments during the incident. This is true even in light of Grievant's work record. Even considering Grievant's prior thirty (30) day suspension, termination is inappropriate. If some discipline is warranted, a far lower level of discipline than a thirty (30) day suspension is appropriate – closer to a one (1) day suspension.

In light of all the evidence, the grievance should be sustained, the discipline rescinded and expunged, and Grievant should be reinstated to his former position and made whole. The Arbitrator is requested to retain jurisdiction.

DISCUSSION AND OPINION

The record demonstrates that Grievant refrained from getting involved in the events of July 19, 2015 until his wife was on the ground, screaming, being held and physically attacked by two (2) of the [REDACTED] neighbors. One of these neighbors testified at Grievant's criminal trial: A [REDACTED] B [REDACTED].

A [REDACTED] B [REDACTED] was the daughter of the neighbors at [REDACTED]. She testified at Grievant's criminal trial that Grievant only got involved when, during the melee, the following occurred: Ms. B [REDACTED] and her mother were standing over Ms. L [REDACTED]. Ms. L [REDACTED], whom Ms. B [REDACTED] estimated stands about 5' 3" tall, was on the ground, covering her face and head, while Ms. L [REDACTED] and Ms. B [REDACTED] mother were holding onto each others' hair. Ms. L [REDACTED] was screaming at both of them to let her go. Ms. B [REDACTED] testified that her mother did not let go of Ms. L [REDACTED], and instead of letting go of Ms. L [REDACTED], she (Ms. B [REDACTED]) proceeded to punch Ms. L [REDACTED] between 20 and 30 times. It was at this point that Grievant got involved, telling Ms. B [REDACTED] and her mother to let go of his wife. City Exhibit 3.

Also testifying at Grievant's criminal trial was T [REDACTED] R [REDACTED], an across-the-street neighbor who lived at [REDACTED]. He testified that Ms. L [REDACTED] brought the shovel out of the house, and that Ms. B [REDACTED] had taken the shovel from Ms. L [REDACTED] prior to Grievant's involvement. Mr. R [REDACTED] testified that when Grievant got involved, he took the shovel from Ms. B [REDACTED] to protect his wife. City Exhibit 3.

That Grievant only became involved when his wife was on the ground being physically attacked by two (2) people is a critical mitigating factor. However, notwithstanding that Grievant was attempting to defend his wife from physical attack, the facts and circumstances of this record establish that Grievant acted inappropriately. Grievant engaged in conduct constituting Conduct Unbecoming, though not to the level of criminal offense.

The record establishes that a 22-year PPD veteran, especially one in Grievant's

circumstance, with Grievant's work history, should have known better than to become involved in the incident of July 19, 2015, particularly to the extent that he did.

Consequently, under the facts and circumstances of this record, the City had just cause to discipline Grievant for serious misconduct, but not to dismiss him.

PENALTY

The City contends it had just cause for dismissal, and that dismissal is the appropriate penalty. The City argues that if no just cause for dismissal is found, then the appropriate penalty is a thirty (30) day suspension without back pay.

The Union contends that the City had no just cause for any discipline, let alone dismissal. The Union argues that if just cause is found for any discipline, the appropriate penalty should be minimal, such as a one (1) day suspension, and Grievant should be otherwise made whole, including back pay.

The record establishes that Grievant's misconduct in this matter was serious, warranting a substantial penalty. In view of all the facts and circumstances of this record, including Grievant's work record, and after consideration of the parties' respective penalty arguments, the undersigned concludes that the City had just cause to impose a thirty (30) day suspension without pay until September 17, 2018.

Therefore, based upon all of the foregoing, the following Award is issued:

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AWARD

The grievance is sustained in part and denied in part.

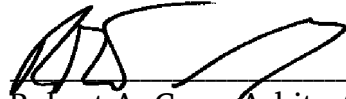
The City did not have just cause to dismiss Grievant, Ernest Lawyer. The City shall immediately reinstate Grievant and convert his dismissal to a thirty (30) day suspension without pay until September 17, 2018.

Grievant's reinstatement is subject to normal pre-hiring conditions.

Any further violations of the Department's Disciplinary Code shall be grounds for further discipline, up to and including Grievant's dismissal.

As requested by the parties, the Arbitrator retains jurisdiction to resolve any disputes that may arise from the implementation of this Award.

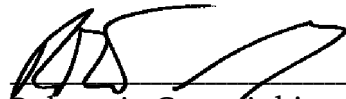
Dated: November 28, 2018


Robert A. Grey, Arbitrator

AFFIRMATION

I hereby affirm that I executed this instrument as my Opinion and Award.

Dated: November 28, 2018


Robert A. Grey, Arbitrator